

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 : Criminal No.
 vs. :
 : 05-120-01
 OUMAR KAMARA :
 :

MEMORANDUM ORDER

Juan R. Sánchez, J.

October 28, 2005

The United States Government asks this Court to disallow Oumar Kamara's justification defense to a charge of failure to depart in violation of 8 U.S.C. § 1253(a)(1)(C).¹ Kamara argues he was justified in refusing to board US Air Flight 42 for deportation to his native country of Sierra

¹8 U.S.C. § 1253. Penalties related to removal

(a) Penalty for failure to depart

(1) In general

Any alien against whom a final order of removal is outstanding by reason of being a member of any of the classes described in section 1227(a) of this title, who--

(A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal under administrative processes, or if judicial review is had, then from the date of the final order of the court,

(B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure,

(C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or

(D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined under Title 18, or imprisoned not more than four years (or 10 years if the alien is a member of any of the classes described in paragraph (1)(E), (2), (3), or (4) of section 1227(a) of this title), or both.

Leone because, if returned, he faces death or serious bodily injury because of his and his father's involvement in Sierra Leone politics. Kamara fears government agents and victims of the Revolutionary United Front (RUF) because he was forced to work as a mechanic with the past government and the RUF, his father was involved in politics, and Kamara was convicted of sexual abuse in New York. The Government argues Kamara fails to establish imminent threat of death or serious bodily injury in Sierra Leone. I agree. Kamara's proffer is insufficient to establish the commission of the crime charged was justified or done out of necessity. After a hearing on October 24, 2005, I find the following:

STATEMENT OF FACTS

1. Oumar Kamara is a native and citizen of Sierra Leone.
2. Kamara entered the United States on November 5, 1996, as a non-immigrant business visitor, and on October 26, 1998 he was granted asylum under Section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158.
3. On May 4, 2000, Kamara was convicted of three counts of sexual abuse in the first degree and endangering the welfare of a child and was later sentenced to a two-year prison term.
4. On March 12, 2002, the Newark Asylum Office issued Kamara a "Notice of Intent to Terminate Asylum Status" and upon completion of his sentence the Immigration officers took him into custody for a hearing before an immigration judge.
5. On March 21, 2002, Kamara was issued a notice to appear before an immigration judge charging him with being removable for having been convicted of an aggravated felony.
6. On August 8, 2002, Grace A. Sease, Immigration Judge, denied Kamara's application of asylum, withholding of removal and deferral of removal. Immigration Judge Sease ordered Kamara removed

the United States to Sierra Leone.

7. Kamara appealed Immigration Judge Sease's decision to the Board of Immigration Appeals. The Immigration Board of Appeals issued a one page decision dismissing his appeal. In his appeal to the Board of Immigration Appeals, Kamara claimed the immigration judge erred in finding him ineligible for relief under the Convention Against Torture. In dismissing Kamara's appeal, the immigration board agreed with the immigration judge's conclusion recent country reports did not support his claim former members of the government and RUF are currently tortured in Sierra Leone or his claim he will be tortured because of his relationship to his father. The Board found Kamara had not met his burden under the Convention Against Torture.

8. Kamara also filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania. In a three page memorandum and order, the Honorable Edmund V. Ludwig denied Kamara's Petition for Writ of Habeas Corpus finding the situation Sierra Leone has changed markedly since he left the country in 1996 and current conditions do not support that he will be subject to torture. Slip op., No. 03-1972, at 3. Judge Ludwig found evidence to "justify the rebuttal of the presumption in favor of the petitioner." Slip op., No. 03-1972, at 3 (internal citations omitted).

9. Kamara's Petition for a Stay of Removal was denied in the United States District Court of New York on September 30, 2004; three months later the immigration deportation officers took Kamara to the Philadelphia airport to board USAir Flight 42 to return to his native country of Sierra Leone.

10. Kamara refused to board USAir Flight 42, claiming he was sure he would be killed or tortured or imprisoned upon his return to Sierra Leone. Deportation Officer Ryan Morris served Kamara Form 1-229(a) warning him for failure to depart and Kamara continued to refuse to board the plane

advising the officers he will cause a disturbance, will not board the plane and physically resisted their efforts to board the plane. The immigration officers ultimately were not able to deport him to Sierra Leone.

11. Thereafter, on March 3, 2005, Oumar Kamara was indicted for preventing and hampering his departure from the United States of America pursuant to a final deportation order in violation of Title 8 U.S.C. § 1253(a)(1)(c).

12. On October 24, 2005, a pretrial hearing was held before this Court to allow Kamara to introduce evidence to support his bald assertions of death or torture in the event he was to be returned to Sierra Leone. In support of his justification defense, Kamara produced Joseph Opala's affidavit dated July 21, 1998. Opala was a Scholar in Residence at the Penn Center, St. Helena Island, Beaufort County, South Carolina, who received an M.A. in Anthropology from the University of Oklahoma in 1981 and a B.A. in Anthropology from the University of Arizona in 1974. Opala lived for most of the twenty-three year period from 1974 to 1997 in Sierra Leone. Additionally, Kamara introduced without objection a U.S. Department of State Bureau of Consular Affairs travel advisory. The advisory stated security has improved significantly since the end of the Civil War in 2001 in Sierra Leone; but, security incidents are increasing as a result of the transition from United Nations peacekeeping to the Sierra Leone police and army forces who are now taking over responsibility for security throughout the country. The travel advisory points out there has been an increase in homicides and law enforcement response to crime has been slow.

14. The Government presented an affidavit from Rachel Doherty, the Political and economic Officer at the U.S. Embassy in Freetown, Sierra Leone, which stated the civil war officially ended in 2002 and the country has undergone an extensive demobilization, reintegration and reconciliation process.

Former rebel combatants, including fighters from the RUF, have disbanded and have returned to their communities. The United Nations peacekeeping forces, UNAMSIL, officially returned responsibility for security to the Sierra Leone police in 2004. Doherty maintains the human rights reporting portfolio at the embassy and states in her affidavit there have been no reports of retribution from RUF fighters towards civilians since October 2004.

DISCUSSION

Kamara asserts he was justified in preventing his deportation from the United States to Sierra Leone to save his life. The Government argues Kamara's justification defense is insufficient as a matter of law in that he has failed to establish that the harm he was facing upon his return to Sierra Leone was imminent.

In this case, Kamara conceded he prevented his deportation in violation of 8 U.S.C. § 1253(a)(1)(c), but claims he acted with justification. To present a justification defense to a jury, Kamara must show: (1) he or someone else was under an unlawful and present threat of death or serious bodily injury; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) he had no reasonable legal alternative to avoid both the criminal conduct and the threatened death or injury; and (4) there was a direct causal relationship between the criminal act and the avoidance of the threatened harm. *United States v. Paolello*, 951 F2d 537, 540-41 (3rd Cir. 1991).

During the hearing, Kamara and the Government conceded Kamara's only viable defense was the first, he was under unlawful and present threat of death or serious bodily injury. Kamara has not established imminent harm. Kamara cites a case from a district court in Colorado which allowed a justification defense when the harm avoided is deportation. *U.S. v. Dagnachew*, 808 F. Supp.

1517, 1521 (D. Colo. 1992). The defendant in *Dagnachew* prevented his deportation to Ethiopia. *Id.* at 1519. Ethiopia was in upheaval and the prosecutor conceded Ethiopia was a place to which he would not want to return. *Id.* at 1523 n. 5. The defendant presented “more than mere supposition” he would be subject to persecution. *Id.* at 1522. In the present case, Kamara has not provided sufficient evidence he would be subject to persecution.

Kamara also relies on *U.S. v. Kpomassie*, 323 F. Supp. 2d 894 (W.D. Tenn. 2004). In *Kpomassie* the defendant had come to the United States to escape death at the hands of government forces in Togo for political reasons. The *Kpomassie* court held a defendant must have a well-founded fear of persecution upon return to his country. *Kpomassie*, 323 F. Supp. 2d at 897. The well-founded fear has both an objective and a subjective component. *Id.* The defendant “must actually fear he will be persecuted upon return to his country, and he must present evidence establishing an ‘objective standard’ under which his fear can be deemed reasonable.” *Id.* (citations omitted). The defendant in *Kpomassie* was allowed to proceed with his justification defense at trial because he was able to show – through an affidavit from a professor – the dangers of the political climate in Togo and the potential harm awaiting him on his return. *Id.* at 900.

Kamara may have suffered at the hands of the Sierra Leone government in the past, but he has not proved the political climate in Sierra Leone is still in such a state that he would face imminent harm on his return. The evidence Kamara offers is a six-year-old affidavit based on the past political climate of Sierra Leone, a political climate that apparently no longer exists. Kamara’s evidence is more than countered by Doherty’s affidavit, which describes a country very different today than it was six years ago at the time of Opala’s affidavit or nine years ago as it was at the time of Kamara’s departure. Kamara has failed to meet the standard of a justification defense.

Accordingly, I enter the following:

ORDER

And now, this 28th day of October, 2005, the Government's Motion *in Limine* to Exclude Defendant's Justification Defense is GRANTED.

BY THE COURT:

\s\ Juan R.Sánchez
Juan R. Sánchez, J.